

**MINUTES**  
**Approved by the Committee**  
**Committee on Federalism**  
**Wednesday, September 22, 2021**  
**9:00 A.M.**  
**Room WW02**  
**Boise, Idaho**

Cochair Vick called the meeting to order at 9:10 a.m.; a silent roll call was requested.

Members in attendance: Cochair Senator Steve Vick and Senators Daniel Johnson, Mark Harris, Carl Crabtree, and Dave Nelson (via Zoom); Cochair Representative Sage Dixon and Representatives Judy Boyle, Megan Blanksma, Wendy Horman, and Chris Mathias (via Zoom); LSO staff Kristin Ford, Trevor Ahrens, Jennifer Kish, and Justin Pasin.

Audience sign-in: Fred Birnbaum - Idaho Freedom Foundation; Jen Graves; Lyn Laird; Rosa Martinez; Doug Gross; Al Gunter; Victoria Stump; Representative Ron Mendive; and Peggy Carrick.

NOTE: Presentations and handouts provided by the presenters/speakers are posted to the Idaho Legislature's website <https://legislature.idaho.gov/sessioninfo/2021/interim> and copies of those items are on file at the Legislative Services Office in the State Capitol. Recordings of the meeting also may be found under the committee's listing on the website.

#### **FEDERAL RULES PROMULGATION PROCESS**

Cochair Vick called upon Mr. Jon Jukuri, Federal Affairs Advisor, Labor Division of the National Conference of State Legislatures (NCSL), for his [presentation](#) and comments regarding the federal rules promulgation process, specifically related to the vaccine mandate issued by the Occupational Safety and Health Administration using the emergency temporary standard (ETS). This emergency rule would obligate employers with more than 100 employees to require their employees to be vaccinated against COVID-19 or be tested weekly for COVID-19. For Idaho, this would apply to private sector employers since Idaho does not have an OSHA-approved State Plan.

- Sen. Crabtree inquired about the timeline for the ETS to take effect at the state level. Mr. Jukuri responded that a state with an OSHA-approved State Plan, which Idaho does not have, would have 30 days from the federal promulgation to get state and local governments into compliance; it would be the same 30-day window for private sector employers within Idaho. He cautioned that such a timeline was still uncertain since a "date effective" could be placed in the ETS.
- Cochair Dixon asked for clarification on the timeline since the chart (page 4) showed that it would take 26-63 months to approve a rule. Mr. Jukuri noted that a longer timeline was in place for the normal rulemaking process but that an emergency rule was expedited.
- Rep. Blanksma inquired about the timeline that occurred with the ETS that was issued in 1983 (last known use of ETS process). Mr. Jukuri believed it to be 4-12 months. [Information provided later by Mr. Jukuri: November 4, 1983 – ETS issued on asbestos; November 17, 1983 – court petition filed against the ETS and a stay is issued by the court; March 7, 1984 – U.S. Court of Appeals strikes down the ETS; April 1984 – OSHA issues notice of proposed rulemaking related to a permanent asbestos standard.]
- Rep. Horman wanted clarification as to when the ETS requirements of such a rule were established and whether the term "grave danger" was defined. Mr. Jukuri reported that the ETS was established under the Occupational Safety and Health Act of 1970 (OSH Act), and was used approximately ten times between 1970 and 1983. He believed that the term "grave danger" had no further explanation other than its use in the act.

- Cochair Dixon asked whether a challenge to the rule would delay the implementation of the ETS for only the entity bringing the challenge or would it apply to all. Mr. Jukuri, reiterating that he was not a lawyer, noted that it would depend on the language of a suit but also noted that, being an ETS, the suit may be expedited by the court.
- Cochair Dixon asked whether hospitals or other entities operated by a community, state, or local government would be required to adopt the ETS in those states without an OSHA-approved State Plan. Mr. Jukuri was not certain, but offered that it would not apply to schools because Idaho has no OSHA-approved State Plan. Rep. Horman asked whether a school that filed for Medicaid under special education services would then be required to enforce the ETS on its staff. Mr. Jukuri could not confirm whether that would apply and advised members to "wait and see" on the requirements when the rule was actually published.
- Sen. Johnson, referencing a congressional report dated September 13, 2021, asked why employers were not required to report incidents related to the vaccine when they were required to do so earlier. Mr. Jukuri was familiar with the report but would need to look into it further. [Information provided later by Mr. Jukuri: 1) The federal government has a standard process through the Vaccine Adverse Event Reporting System (VAERS) for reporting adverse reactions to vaccines generally. This has been around well before COVID-19. 2) OSHA will not enforce 29 CFR 1904's recording requirements to require any employers to record worker side effects from COVID-19 vaccination at least through May 2022. We will reevaluate ... moving forward.]
- Rep. Mathias requested information regarding the court case of 1983 and the administrative court ruling.

At 9:40 a.m., the committee took a break.

## **PUBLIC TESTIMONY**

At 9:50 a.m., Cochair Vick invited the first individual to provide public testimony on the federal vaccine mandate, starting with those individuals in attendance and then proceeding to those registered to provide remote testimony. Each individual was given three minutes to provide his/her comments.

- Fred Birnbaum, Idaho Freedom Foundation - BOISE - testified against the federal vaccine mandate.
- Jen Graves - NAMPA - testified against the federal vaccine mandate.
- Lyn Laird - MERIDIAN - testified against federal intervention.
- Rosa Martinez - ADA CO. - testified against the federal vaccine mandate.
- Doug Gross - EAGLE - testified against the federal vaccine mandate.
- Al Gunter - UNKNOWN - testified against the federal vaccine mandate.
- Kathy Dawes (remote) - MOSCOW - testified in favor of the federal vaccine mandate.
- Diane Baumgart (remote) - MOSCOW - testified in favor of the federal vaccine mandate.
- Brandon Ostberg (remote) - IDAHO FALLS - testified against the federal vaccine mandate.
- Marguerite Shaw (remote) - DRIGGS - testified in favor of the federal vaccine mandate.
- Sean Wood (remote) - ARCO - testified against the federal vaccine mandate.

Sen. Harris asked whether the Idaho National Laboratory (INL) had established a date when employees would have to provide proof of being vaccinated. Mr. Wood responded that the contractor for which he worked had issued a date of December 1, 2021.

- Clark Albritton (remote) - COEUR D'ALENE - testified against the federal vaccine mandate.
- Mario Perea (remote) - MERIDIAN - testified against the federal vaccine mandate.
- Jordan Norr (remote) - FILER - testified against the federal vaccine mandate.

- Lorna Mitson (remote) - GARDEN CITY - testified against the federal vaccine mandate.
- Monica McKinley (remote) - MERIDIAN - testified against the federal vaccine mandate.
- Tami Blayney (remote) - CALDWELL - testified against the federal vaccine mandate.
- Greg Kershul (remote) - EMMETT - declined to testify.
- Rebecca Haley (remote) - MOSCOW - testified in favor of the federal vaccine mandate.
- Lorrie Wilder (remote) - BOISE - testified against the federal vaccine mandate.
- Lyle Johnstone (remote) - EDEN - testified against the federal vaccine mandate.
- Carol Mitchell (remote) - BOISE - testified in favor of the federal vaccine mandate.

At 11:43 a.m., having exhausted the morning's registrations for testimony, the committee recessed for lunch.

### **PRESIDENTIAL VACCINE MANDATE - STATE'S VIEW**

At 1:05 p.m., the committee resumed its agenda by bringing forward Mr. Brian Kane, Chief Deputy for Idaho's Office of the Attorney General, for his [presentation](#) and comments regarding the proposed federal vaccine mandate and federalism.

- Rep. Horman, noting that the *Jacobson* case dealt with state authority, asked whether there was any precedence regarding federal authority. Mr. Kane responded that there was not; he noted that if Congress should create a law for all states to enforce, even that would change the conversation. Rep. Horman asked for clarity on the timeline of executive orders 14043 and 14042. Mr. Kane offered that EO 14043 was in effect and that EO 14042 had a task force issuing guidance on its implementation. Rep. Horman noted that INL had issued a timeline for employees in regards to EO 14042 and wondered whether any federal guidance may conflict with INL's current timeline. Mr. Kane proffered that a conflict would occur if the federal contractor issued a more generous timeline than the federal timeline. Rep. Horman wondered whether any action could be taken or any exemptions could be made by Idaho's legislative members or by a governor's executive order to provide protection for Idaho's citizens. Mr. Kane explained that the federal government has the right to "preempt" state regulations in certain areas. He added that if the federal government creates regulations for its federal employees then the state will be hard-pressed to insert itself. Also, if federal contractors agree to the conditions in order to continue employment, then that would be another barrier to a state action. Rep. Horman queried whether a school or other entity that accepts Medicaid money would be required to obligate state employees to the federal mandate. Mr. Kane submitted that it would.
- Sen. Johnson, per Rep. Horman's question, wondered whether a small business with fewer than 100 employees that received a small business administration (SBA) loan would be subject to the federal mandate. Mr. Kane replied that it was possible but that exemptions identified in the executive order and possibly in the ETS were yet to be issued.
- Cochair Dixon inquired how the Health Freedom Act [Ch. 90, T. 39, I.C.] would interact/counteract the federal mandate. Mr. Kane explained that reference to that act was the heart of the letter from the Idaho delegation and Idaho governor to the president.
- Cochair Vick, regarding EO 14042 and 14043, asked whether there were exemptions based on where an employee resided. Mr. Kane responded that the federal exemptions identified would most likely be exemptions related to ADA requirements, a recognition of religious or work place accommodation. Cochair Vick asked whether any federal contractor would include any employee that receives federal money, such as those building federal bridges or highways. Mr. Kane submitted that it may; the executive order included a series of exemptions, as well as a cost threshold.

- Rep. Horman inquired about employers going beyond those ADA-related exemptions, those not permitting working from home or requiring social distancing. Mr. Kane replied that such situations were business decisions. He pointed out that an employee needed to provide proof of the requested exemption and such exemptions were not guaranteed to be granted. Mr. Kane added that denial of such request could be challenged.
- Rep. Mathias asked Mr. Kane's opinion as to how courts would receive/respond to the executive orders and mandates for employees that bring suit. Mr. Kane responded that he was unable to predict that.
- Cochair Dixon asked whether "grave danger" was clearly defined. Mr. Kane noted that there was reference to such in the *Asbestos Information Assoc. v. OSHA* case but added that the definition "grave danger" needed to be clarified in the ETS to be issued.

### **FISCAL IMPACT OF LOSING FEDERAL MEDICAID/MEDICARE DOLLARS**

At 1:50 p.m., Ms. April Renfro, Division Manager of LSO Legislative Audits, was invited to the podium for her [presentation](#) and comments regarding the fiscal impact of losing federal Medicaid funding.

- Rep. Blanksma asked for clarity about referenced entities that received Medicare and Medicaid reimbursements, noting that it was a large umbrella. Ms. Renfro explained that such reference was used as taken from the CMS website but that her presentation focused on funds received under Idaho's Medicaid Cluster as reimbursements as audited by her office, which would include many different programs. She noted that more clarity would be achieved once the ETS was issued.
- Cochair Vick inquired whether the guidance requiring "COVID-19 vaccinations for workers in most health care settings" would apply to a dental office that received Medicare payments. Ms. Renfro believed it would. Cochair Vick commented that such a requirement may make it more difficult for medical providers who accept Medicare to continue doing so.
- Rep. Horman asked for clarification on the type of entities included under the Medicaid cluster spending, especially those not identified as health care entities. Ms. Renfro replied that it included clients that get direct payments rather than just entities; this would include schools if they received Medicare reimbursements. Rep. Horman wondered whether it was possible to calculate costs for small business owners to track compliance with these requirements. Ms. Renfro noted that administrative costs would be a start (such as software to monitor compliance), as would costs for auditing. Rep. Horman asked about the state's cost to audit Medicare and Medicaid. Ms. Renfro replied that it was approximately \$1 million to audit all federal funds received by the state, but that she could follow up on that to report the number of hours attributed to Medicaid.

At the conclusion of Ms. Renfro's Q&A, the committee took a break.

### **PRESIDENTIAL VACCINE MANDATE - ATTORNEY'S VIEW**

At 2:23 p.m., Mr. Christ Troupis, attorney with Troupis Law Office, was called to the podium for his comments on the federal vaccine mandate. Mr. Troupis referenced many documents during his comments, including [CRS Could the President or Congress Enact a Nationwide Mandate](#), [CRS State and Federal Authority to Mandate COVID-19 Vaccination](#), [Herman Avery Gundy v. United States](#), [Ronald W. Paul v. United States](#), and [Alabama Assoc of Realtors v. Department of Health and Human Services](#).

- Cochair Vick asked whether Mr. Troupis's claim that there was strong legal ground for employers to bring suit was in regard to the ETS or the executive orders 14042 and 14043. Mr. Troupis responded that the federal government had jurisdiction to control wherever it sends money.
- Rep. Mathias inquired why there were not more complaints by employers who felt bullied by this mandate. Mr. Troupis believed that no one wanted to be the first to step forward and be made an example of. Rep. Mathias asked whether Mr. Troupis felt it reasonable for OSHA

to mandate companies to require weekly COVID tests to ensure "undiminished health or life expectancy" for employees. Mr. Troupis responded that it was reasonable to provide testing but it was not reasonable to require testing by that entity. Rep. Mathias inquired whether Congress lacked the authority to delegate power/authority to OSHA. Mr. Troupis submitted that for any lawsuit brought against a statute on the ground of being unconstitutional, one would need to prove: 1) facial challenge or 2) as-applied challenge. He felt that this was a good case for the as applied challenge.

- Rep. Horman inquired about the statement from an earlier testimony that claimed that the mandate was a violation of one's "bodily" property. Mr. Troupis referenced the *Jacobson v. Commonwealth of Massachusetts* case of 1905, which established that a state has the authority to require vaccination as well as the *Zucht v. King* case of 1922. He noted that there were exemptions related to both cases.

## **PUBLIC TESTIMONY**

At 3:00 p.m., Cochair Dixon invited the next registered individual to provide public testimony on the federal vaccine mandate, starting with those individuals in attendance and proceeding to those registered for remote testimony. Each individual was given three minutes to provide his/her comments.

- Victoria Stump, self and Take a Stand Now - ADA CO. - testified against the federal vaccine mandate.  

Rep. Boyle asked whether Ms. Stump knew personally of individuals who had been denied a requested medical or religious exemption. Ms. Stump replied that she did and that she could provide written testimony from those individuals.
- Rep. Ron Mendive - COEUR D'ALENE - testified against the federal vaccine mandate.
- Peggy Carrick - ADA CO. - testified against the federal vaccine mandate.
- Heidi Caye (remote) - BOISE - testified against the federal vaccine mandate.
- Nicholas Christiansen, self and employee representing others of INL (remote) - IDAHO FALLS - testified against the federal vaccine mandate.
- Mark Hand (remote) - NEZ PERCE - testified against the federal vaccine mandate.
- Melinda Offer (remote) - NAPLES - testified against the federal vaccine mandate.
- Laura Bracken (remote) - LEWISTON - testified in favor of the federal vaccine mandate and a mask mandate.
- Shirliza Oaks (remote) - MERIDIAN - testified against the federal vaccine mandate.
- Rep. Barbara Ehardt - IDAHO FALLS - testified against the federal vaccine mandate.

Upon conclusion of testimony, the committee discussed the option of an early October meeting. With no further business before the committee, the meeting was adjourned at 3:50 p.m.